

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 17th October, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

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BETWEEN:

Clean Solar Power (Hiriyur) Pvt. Ltd.,
212, Ground Floor,
Okhla Industrial Estate Phase – III,
New Delhi – 110 020.

.. **PETITIONER**

[Represented by Navayana Law Offices, Advocates]

AND:

1) Hubli Electricity Supply Company Ltd.,
Corporate Office,
P.B Road, Navanagar,
Hubballi – 580 025.

2) Karnataka Renewable Energy Development Ltd.,
BVB College Campus,
Vidya Nagar,
ESCPG Block,
Hubballi – 580 031.

.. **RESPONDENTS**

*[Respondent-1 represented by Indus Law, Advocates,
Respondent-2 represented by Sri. G. S. Kannur, Advocate]*

ORDERS

- 1) The Petitioner, has filed this petition under section 86(1)(f) of the Electricity Act, 2003 praying to:
 - (a) Declare that the tariff of Rs.7.47 per kWh is applicable to the Petitioner's Project, as per the Power Purchase Agreement (PPA) dated 19.02.2014 executed between the Petitioner and the Respondent No.1 produced as Annexure P2;
 - (b) Approve the Supplemental Agreement dated 20.10.2015 signed by the Petitioner and Respondent No.1; and,
 - (c) Issue such other order as the Commission may deem fit in the circumstances of the case.

- 2) The facts of the case and Petitioner's submissions in support of the above prayers as made in the petition may be summed up as follows:
 - (a) Pursuant to the Government of Karnataka's decision for development of 130 MW Solar Energy in the State through private sector participation, Respondent No.2, invited proposals by "Request for Proposal" (RfP) dated 5th March, 2013 and prescribed the technical and commercial terms and conditions for selection of bidders for undertaking the development of solar power projects.
 - (b) The Petitioner participated in the bid and was selected. By letter dated 23.08.2013 of Respondent No.2, a Letter of Award (LoA) was issued in favour

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of the Petitioner, as per which, the Petitioner was required to develop 10 MW Solar PV Power Plant at Chitradurga Taluk, Chitradurga District.

- (c) The Petitioner entered into PPA dated 19.02.2014 with the Respondent No.1, a distribution licensee. The agreed tariff was Rs.7.47 per kWh. The said PPA was approved by the Commission vide letter dated 13.03.2014.
- (d) Respondent No.1 wrote a letter to the Petitioner on 29.03.2014 requesting the Petitioner to carry out changes in the PPA with respect to deletion of the Arbitration clause, as per the instructions of the Commission.
- (e) The Petitioner vide letter dated 11.04.2014 requested the Respondent No.1 for time to carryout changes in PPA and to treat any change in the PPA as an amendment and further, to treat the date of such amendment as "effective date" of the PPA. However, no response was received despite a meeting held on 24.4.2014 with the Respondent No.1 and subsequent correspondence. After another meeting, on 03.07.2014, the PPA was amended on 11.07.2014. But, the copy of the signed PPA was given to the Petitioner only on 13.08.2014.
- (f) The Petitioner had to change the location of the project as the land previously identified was not available for the setting up of the project as on 13.08.2014, as the owner had sold the land to others. The Petitioner changed the location of the project from Ramajoghally village to Murudi Village, Devasamudra Hobli, Molakalmuru Taluk, Chitradurga District, as per clause 1.1.10 of the RfP, and the same was communicated to the

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Respondent No.1 by letter dated 12.02.2015 and a request was made to the Respondent No.1 to issue an amendment to the PPA dated 19.02.2014 for change of location of the project site.

- (g) Upon request of the petitioner, the Respondent No.1, by its letter dated 17.10.2014, granted additional time for commissioning of the project upto 18.08.2015, and the project was commissioned on 14.08.2015.
- (h) Pursuant to the Petitioner's letter dated 26.08.2015 requesting to execute a Supplemental PPA incorporating the changed location of the project, the Petitioner and Respondent No.1 entered into a Supplemental PPA dated 20.10.2015 to incorporate the change. The said supplemental PPA was sent to the Commission for approval by the Respondent No.1 under its letter dated 21.10.2015. However, the Commission, without approving the Supplemental PPA, communicated to the Respondent No.1 by its letter dated 18.11.2015 that as the project was granted extension of time upto 17.08.2015 for commissioning, the applicable tariff would be Rs.6.5 per kWh. The Respondent No.1 replied to the Commission vide letter dated 06.01.2016, stating that extension of time was granted invoking the force majeure clause of the PPA and that the revised tariff is applicable for projects commissioned after 01.09.2015. However, the Commission, vide letter dated 28.01.2016 returned the Supplemental PPA with a direction to resubmit the same after amendment as per its directions made in the letter dated 18.11.2015.

- (i) The Respondent No.1, by its letter dated 08.02.2016 called upon the petitioner to sign the Supplemental Agreement incorporating the modifications in accordance with the directions issued by the Commission.
 - (j) The Petitioner filed WP No.27799/2016 (GM-KEB) before the Hon'ble High Court of Karnataka praying to quash the directions issued by the Respondent No.1 in the letter dated 08.02.2016 based on the communication dated 18.11.2015 issued by this Commission. The Hon'ble High Court of Karnataka, disposed of the petition granting liberty to the Petitioner to approach the Commission in the matter.
 - (k) The Petitioner contends that there is no provision in the original PPA for transplanting tariff of Rs.6.5 per unit in the place of agreed tariff of Rs.7.47 per unit which was discovered through bidding and adopted by the Commission.
 - (l) The Petitioner also contends that as held by the Hon'ble Supreme Court of India in the case of BESCO v/s Konark Power, the tariff agreed in the PPA cannot be changed even by the Regulator and no opportunity was given to the Petitioner before altering the agreed tariff.
- 3) Upon issuance of Notice, the Respondents appeared through their Counsel and filed objections.

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- 4) Respondent No.1 has contended that:
- (a) Upon the PPA being submitted to the Commission for approval, the Commission returned the PPA with a direction that the Arbitration clause in the PPA needs to be removed. That, thereafter, the Petitioner, instead of carrying out the necessary changes to the PPA, sought to change the effective date of the PPA to the date of carrying out such change.
- (b) The Petitioner insisted that the amendment be carried out only if it is accompanied by a change in the effective date of the PPA. That with the additional time of five months and eight days granted by Respondent No.1 as requested by the Petitioner for completion of the project, the Petitioner sought to execute the project as envisaged. That at this juncture, Respondent No.1 learnt that the Petitioner was not the owner and possessor of the land on which the project was intended to be executed, in contravention of Clause 4.2(f) of the PPA read with the first schedule of the PPA.
- (c) Clause 4.1 of the PPA required the Petitioner to satisfy the Conditions Precedent within 180 days of the effective date mentioned in the PPA. That as per Clause 4.2(f) read with the first schedule of the PPA, Conditions Precedent could be fulfilled by the submission of documents evidencing the Petitioner's full ownership / lease-hold and possession of the land. That the

act of Petitioner not undertaking the necessary steps to secure the specified land was inexplicable and shows the lackadaisical attitude of the Petitioner.

- (d) The Petitioner requested Respondent No.1 to permit it to execute the project on the alternative land. That the Petitioner, at its own risk and cost, chose not to execute a supplemental PPA within reasonable time. That, hence, the Petitioner failed to fulfil the timelines stipulated in the PPA.
- (e) The grievance of the Petitioner is not against the respondents but, it is against the Orders and Directions passed by the Commission. That the appropriate legal remedy would be to file an appeal before the Appellate Tribunal. The averments and prayer are against the quasi – administrative and quasi executive orders and directions of the Commission and such disputes are outside the scope of Section 86(1)(f) of the Electricity Act, 2003. That, hence, the petition is not maintainable and merits dismissal *in limine*.
- (f) There was a delay in commissioning the project beyond the stipulated commissioning date mentioned in the PPA. That, during the intervening period, the Commission deemed it fit to fix the tariff at a rate lower than the agreed tariff. That, Clause 12.1 came into effect as the project was delayed beyond the scheduled commissioning date. That as the applicable tariff as on the date of the commissioning of the project was lower than that stipulated in the PPA, the tariff determined by the Commission would be the applicable tariff.

- (g) As the signed copies of the PPA were submitted to the Commission for approval, the same could not be made available to the Petitioner until such copies were returned to the custody of Respondent No.1.
- (h) The decision of the Hon'ble Supreme Court of India in BESCO Vs Konark Power Projects Pvt Ltd., is not applicable to the Petitioner's case, as the Hon'ble Supreme Court held that a Regulator does not have the power to alter tariff for power purchase agreements that are already executed and concluded. That, in the Petitioner's case, the PPA and Supplemental PPA did not reach conclusion as the pre-requisite for such conclusion would be to obtain the approval of the Commission.
- 5) Respondent No.2 in its Objections has contended that:
- (a) Since the PPA was executed between the Petitioner and the Respondent No.1, it is for the Respondent No.1 to consider the request of the Petitioner. That, after issuance of the LoA, the Respondent No.2 had no further role to play in the matter.
- (b) As per clause 1.1.10 of RfP, change of location is admissible, but the tariff as on the date of execution of supplemental agreement would be applicable to any such project.

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- 6) We have heard the Counsel for both sides and perused the records.

- 7) The following issues would arise for our consideration:
 - (1) Whether the Petition is maintainable?

 - (2) Whether the Petitioner's project is entitled to the tariff of Rs.7.47 per kWh as agreed in the PPA, despite the project not being commissioned within the scheduled date of commissioning?

 - (3) Whether the Petitioner has made out a case for extension of time of 180 days for achieving the Conditions Precedent and commercial operation of the Project?

 - (4) What Order?

- 8) Considering the respective pleadings and other documents on record, we proceed to give our findings on the above issues as follows:

- 9) **ISSUE No.(1)** : *Whether the Petition is maintainable?*
 - (a) It is the contention of the Respondent No.1 that the Petitioner ought to have filed an Appeal before the Hon'ble Appellate Tribunal for Electricity, against the order of the Commission reducing the tariff for the project, and that the dispute does not fall under Section 86 (1) (f) of the Electricity Act, 2003. We note that this petition is filed pursuant to the Order dated 14.12.2016 of the Hon'ble High Court of Karnataka in W.P. Nos. 27799 & 46729/2016 wherein a

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direction was issued to the Petitioner to approach the Commission, as no opportunity of hearing was given to the Petitioner while reducing the tariff. We also note that the directions of the Commission communicated to the Respondent No.1 based on which it has taken action affecting the interests of the Petitioner were not as a result of adversarial proceedings. Thus, the Petitioner has had no opportunity to present its case. The dispute is between a generating company and a distribution licensee and hence, the contention of the Respondent No.1 that the Commission has no jurisdiction is not sustainable.

(b) Thus, we answer Issue No.(1) in the affirmative.

10) **ISSUE No.(2):** *Whether the Petitioner's Project is entitled to the tariff of Rs.7.47 per kWh as agreed in the PPA, despite the project not being commissioned within the scheduled date of commissioning?*

(a) We note that the PPA was executed on 19.02.2014 with the 'scheduled Commissioning Date' of the project being 18.02.2015 i.e. twelve months from 19.02.2014, which is defined as the Effective date. Admittedly, the project was commissioned on 14.08.2015 and the delay as per the Petitioner is due to change of location of the project and delay in approval relating to the land. On request of the Petitioner, time was extended by the Respondent No.1 upto 18.08.2015 for commissioning the project. The HESCOM (Respondent No.1) vide letter dated 21.10.2015 submitted a Supplemental Agreement dated 20.10.2015, requesting to communicate

the approval of the Commission. Such agreement mainly provided for change in the location of the Project from that originally envisaged and for extending the scheduled commissioning date of the Project by 5 months and 8 days. The Commission's Office, while processing the request for approval of the Supplemental Agreement, in File No. F-31/Vol-20, noted among other things that, the HESCOM's event of default have been not furnished and that after considering extension of time granted by the HESCOM for the project to be commissioned on 17.08.2015, the applicable tariff would be Rs.6.51 per Kwh as per clause 12.2 of the PPA, which however, is not mentioned in the Supplemental agreement. The Office Note considered that, the HESCOM might be intimated to resubmit the Supplemental Agreement duly incorporating among other things, the reduced tariff of Rs.6.51 per unit. The Office Note was relied upon and the Commission took a decision to approve the Office Note by circulating the file for consideration of Members and Chairman. That decision was communicated to the HESCOM by the Commission, by letter dated 18.11.2015. The HESCOM ,vide letter dated 06.01.2016, among other things, submitted that the tariff (of Rs.6.51 per kwh) determined by the Commission in Order dated 30.07.2015 would be applicable to the projects commissioned after 01.09.2015. The Commission, however, by letter dated 28.01.2016 reiterated its earlier decision and therefore, the Respondent No.1 vide letter dated 08.02.2016 called upon the Petitioner to make modifications with Supplemental Agreement as directed by the Commission.

- (b) We would be examining the issue of correctness or otherwise of the extension of time allowed by Respondent No.1, while answering Issue No.3. We, however, note that the commissioning of the project beyond the scheduled commissioning date as stipulated in the PPA, has had no impact on the tariff agreed to in the PPA.
- (c) The relevant portion of Article 12 of the PPA relating to tariff, reads as follows:

“Applicable Tariff & Sharing of CDM Benefits.

12.1 The Developer shall be entitled to receive the tariff of Rs.7.47/kWh of energy supplied by it to HESCOM in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

12.2 Provided further that if as a consequence of delay in Commissioning of the project beyond the scheduled Commissioning Date, subject to Article 4, there is a change in KERC Applicable Tariff, the changed Applicable Tariff for the project shall be the lower of the following.

- I. Tariff at in Clause 12.1 above.*
- II. KERC Applicable Tariff as on the Commercial Operation Date.”*

- (d) We note that the Commission's Tariff Order dated 30.07.2015 reducing the tariff for MW scale solar projects is applicable for projects commissioned after 01.09.2015. Thus as the Petitioner's project is commissioned on 14.08.2015 there is no cause for change in the applicable tariff for the project which is Rs.7.47 per kWh, as mentioned in Article 12.1 of the PPA. It appears that the Commission was persuaded by the Office Note to the effect that, as the Petitioner's project will be commissioned after 30.07.2015, the revised tariff of Rs.6.51 per kwh would be applicable ignoring the fact that such tariff was effective only from 01.09.2015. The reason assumed by this Commission for intimating the HESCOM to incorporate the reduced tariff of Rs.6.51 per unit is incorrect. Therefore, the intimation sent to the Respondent No.1, on the basis of such a decision through this Commission's letter dated 18.11.2015 and 28.01.2016, is to be recalled. The proper course was to verify the sufficiency of the reasons for the extension of time. We find no support in either RfP or the PPA in support of the contention of the Respondent No.2 that, the tariff, as on the date of execution of Supplemental Agreement, would be the tariff applicable to the Petitioner's project.
- (e) We therefore, answer Issue No. (2) in the affirmative.

11) **ISSUE No.(3):** *Whether the Petitioner has made out a case for extension of time of 180 days for achieving the Conditions Precedent and commercial operation of the Project?*

(a) The Petitioner's contention is that the delay in commissioning the Project which would include fulfilment of Conditions Precedent is solely due to inaction of the Respondent No.1 to carry out changes in the PPA executed on 19.02.2014, as sought by the Petitioner. The Petitioner has also contended that there was a delay in handing over of signed PPA by the Respondent No.1 resulting in, project functioning being delayed and change of location of the project as the land originally identified became unavailable. We note that it would appear that the Petitioner has taken 13.08.2014, the day it purportedly received the signed PPA as the 'effective date' and that it had to fulfil the Conditions Precedent by 12.02.2015, i.e., 180 days from such effective date.

(b) The following dates and events are relevant for deciding the issue:

Sl.No.	Date	Event
1.	19.02.2014	PPA executed between the Petitioner and Respondent No.1
2.	13.03.2014	The Commission communicates its approval for the PPA subject to deletion of clause 18.4 on 'Arbitration'.
3.	29.03.2014	Respondent No.1 writes to the Petitioner to approach the Corporate Office for deletion of Clause 18.4 and sign the modified PPA.

Sl.No.	Date	Event
4.	11.04.2014	Petitioner writes to Respondent No.1 that it would approach the office to execute the modified PPA in the coming week.
5.	24.04.2014	Petitioner addressed a letter to Respondent No.2 requesting for change in the 'Effective Date' of the PPA, stating that the lending institutions consider the PPA effective only after approval by the Commission.
6.	12.05.2014	Petitioner writes to the Commission requesting for change in the effective date of the PPA, stating that lending institutions consider the PPA as effective only after approval by the Commission.
7.	29.05.2014	Petitioner writes to the Respondent No.1 for an appointment to execute the modified PPA.
8.	25.06.2014	Petitioner writes again to the Commission requesting for change in the 'Effective Date' of the PPA.
9.	11.07.2014	Addendum to PPA executed between the parties, deleting the Arbitration Clause.
10.	17.10.2014	Respondent No. 1 extends time to commission the project upto 18.08.2015, upon the Petitioner's request.
11.	14.08.2015	The Project is commissioned.

- (c) As per Article 21.1 of the PPA, 'the effective date' means the date of signing of the PPA. Thus, the Petitioner having signed the PPA with 'effective date' being so, could not have later sought amendment to such date, however justifiable the reasons for it are, according to the Petitioner. It is also not the case of the Petitioner that the RfP issued by the Respondent No.2 provided for any change in the 'Effective Date'. We also note that while part of the PPA which provides for the signature of the parties to the PPA and also the witness clearly states the PPA executed and signed by them is delivered to the parties, the Petitioner chose not to raise the issue of non-delivery of the signed PPA to the Petitioner by the Respondent No.1, immediately, after the execution of the PPA or the conditional approval of the PPA by the

Commission. On the contrary, we note that admittedly the Petitioner was seeking amendment of the effective date of the PPA and was solely responsible for the delay in execution of the addendum to the PPA only on 11.07.2014 in which the arbitration clause as directed by the Commission came to be deleted. We note that a copy of such addendum was not submitted to this Commission. We also gather from the correspondence produced by the Petitioner and the Respondent No.1 that, such addendum also provided for extension of the commissioning date by twenty-two days the period between the date of execution of the PPA and date of approval by the Commission of such PPA though none of the terms of the PPA or the RfP provided for such extension. We further note that admittedly after signing of such addendum to the PPA, on 11.07.2014, the signed copy of the PPA along with the addendum has been given to the Petitioner on 13.08.2014.

- (d) We note that the Petitioner raised among other things, the issue of non-receipt of, the 'original PPA copy' with the Respondent No.2 on 24.04.2014 (Annexure P5), the 'signed PPA' with the Commission on 12.05.2014 (Annexure P6) and the 'copy of the PPA' with the Commission on 25.06.2014 (Annexure P8) and that this issue has not been taken up directly with the Respondent No.1. It is safe to assume that the Petitioner was in possession of the photocopy of the PPA. Therefore, we need to consider, whether the Petitioner has made out a case for extension of six months for achieving the conditions precedent and Commercial Operations on this ground.

(e) Article 5.7.1 of the PPA relating to extension of time reads thus:

"In the event that the Developer is prevented from performing its obligations under Clause 5.1 by the Scheduled Commissioning Date due to:

- (a) Any HESCOM Event of Default; or*
- (b) Force Majeure Events affecting HESCOM; or*
- (c) Force Majeure Events affecting the Developer,*

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Clause 5.7.2 and Clause 5.7.3 for a reasonable period but not less than 'day for day' basis, to permit the Developer or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Developer or HESCOM or till such time such Event of Default is rectified by HESCOM"

(e) Article 16.2 of the PPA stipulates the various Events of Default on the part of the HESCOM (Respondent No.1). It is clear from Article 16.2 that, the various Events of Defaults mentioned, therein, do not include the time taken in the process of approval of the PPA by the Commission. Hence, under Article 5.7.1 (a) of the PPA the extension of time cannot be sought for in respect of time taken for approval of the PPA. We also note that, Article 5.7.1(b) of the PPA, viz. 'Force Majeure Events affecting HESCOM' is also obviously not applicable.

(f) Article 5.7.1(c) of the PPA provides for extension of time on the ground of 'Force Majeure Events affecting the Developer'. The relevant portion of the meaning of 'Force Majeure' as stated in Article 14.31 of the PPA reads thus:

“A ‘Force Majeure’ means any event or circumstance or combination of events including those stated below which wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

- (a) XXX XXX XXX
- (b) XXX XXX XXX
- (c) XXX XXX XXX
- (d) XXX XXX XXX
- (e) XXX XXX XXX ”

(g) Article 14.4 of the PPA stipulates the events of ‘Force Majeure’ exclusions. Article 14.5 provides for the necessity of giving notice of the ‘Force Majeure’ events to the other party. Article 14.6 provides for the duty to perform and Duty to mitigate in the event of ‘Force Majeure by the Affected Party’. Article 14.7 provides for the relief available for a force Majeure event.

(h) Thus it is clear from the above provisions of the ‘Force Majeure’ clauses stated in the PPA that, the non-receipt of the original PPA, or its approval by the Commission, itself cannot be a ground to claim extension of time, on the grounds of ‘Force Majeure’. It should be shown that, the non-availability of the approved original PPA prevented or caused delay to the Petitioner in the performance of its obligations under the PPA. Procuring the finance for the project and acquiring possession of the required extent of land for the

project are the material obligations on the part of the Developer of the project. The Developer is in no way prevented from applying for the Project Finance before the Financiers and for acquiring the requisite land for the Project, based on the photocopy of the signed PPA already available with it and the conditional approval granted by the Commission. A prudent Developer need not wait amendment of the PPA by the Respondent No.1 for initiating steps for procuring the Project Finance and acquiring the requisite land for the Project. As we noted the RfP or the PPA did not provide for amendment of the effective date of the PPA and admittedly the Petitioner alone is responsible for delay in executing the Supplemental PPA so as to delete the Arbitration clause as directed by the Commission. The Respondent No.2 or the Commission could not have directed the Respondent No.1 to amend the effective date of the PPA. Admittedly, the Respondent No.2 had issued the Letter of Award dated 23.08.2013 allotting the project to the Petitioner and thereby the Petitioner had sufficient time to plan implementation of the Project.

- (i) The Petitioner has not given in the Petition, the particulars of the dates on which it has initiated steps to procure the finance for the Project and acquire the required land for the Project. The pleadings of the Petitioner in this regard are very vague and evasive. The Petitioner states that, since no copy of the signed PPA was provided to the Petitioner and the Respondent No.1 failed to amend the 'Effective Date' of the PPA, the Petitioner was unable to procure the required extent of land for the Project resulting in

commissioning of the Project beyond the date stipulated in the PPA, at a location different from the one originally envisaged. It was necessary for the Petitioner to disclose the progress achieved on the various dates with regard to the acquisition of land for its Project. However, the Petitioner has not disclosed these particulars relating to land for the project and for that matter, similar particulars relating to the Project finance. Therefore, we are of considered view that, the Petitioner has failed to establish that it was wholly or partly prevented from acquiring the identified land for the Project, till the receipt of the original PPA on 13.08.2014.

- (j) The Respondent No.1 has contended that the Petitioner by not submitting the documents evidencing acquisition of the land for the Project within 180 days of the 'Effective Date' mentioned in the PPA, has not satisfied clause 4.2(f) of the PPA. Admittedly, the Respondent No.1 otherwise chose to extend the time for fulfilling the Conditions Precedent and also for commissioning of the Project totally by 180 days beyond the dates stipulated in the PPA. We note that out of such 180 days, while 22 days could be taken as attributed by the parties towards the time taken for approval of the PPA by the Commission, for the remaining 158 days as per the letter dated 17.10.2014 of Respondent No.1 (Annexure P9) the reasons are stated to be mentioned by the Petitioner in its letter dated 12.09.2014, a copy of which has not been produced by either the Petitioner or the Respondent No.1 nor such reasons specifically elaborated by them in their pleadings. The process of approval of PPA after the submission of papers

would take some time and when such time taken is reasonable, as in the present case, it cannot be a ground for extension of the 'Effective Date' of the PPA when there are no terms providing for such extension either in the PPA or the RfP. Therefore, the claim of the Petitioner for extension of time for commissioning of the Project towards time taken in approval of the PPA by the Commission and the act of the Respondent No. 1 in extending the date of commissioning by 22 days under Article 5.7.1 of the PPA cannot be accepted. As noted, the addendum dated 11.07.2014 giving such extension has not been submitted to the Commission.

- (k) The question of extension of time, on the ground of '*Force Majeure*' would arise, only if it is established that, the time taken in approval or not handing over the original PPA had delayed the financial closure or disbursement of the loan amount to the Petitioner, by the Financier, or acquisition of the required land by the Petitioner. We note that the Petitioner has failed to establish such a case. We also note that the Petitioner has not raised the issue of non-receipt of the signed original PPA directly with the Respondent No.1 and that the Petitioner has raised such issue only with the Respondent No.2 and the Commission. No proof has been produced by the Petitioner that the copy of the letters addressed to the Respondent No.2 and the Commission on this issue was in fact served on or delivered to the Respondent No.1. We are, therefore, of considered view that the claim of the Petitioner for extension of time under Article 5.7.1 of the PPA and the act of the Respondent No.1 in extending the time in its letter dated 17.10.2014

(Annexure P9) cannot be accepted. It is now well settled that, the Commission has the powers to review any action by the parties under the provisions of a PPA, if it affects consumer interest, and therefore, the public interest. In the present case, the wrong action of extension of time under Article 5.7.1 of the PPA by the Respondent No.1 results in waiver of damages payable by the Petitioner for failure to fulfil the 'Conditions Precedent' specified in Article 4.2 within the agreed period of time and also the liquidated damages for delay in commencement of supply of power by the scheduled commissioning date as per Article 5.8 There was no ground or reason for the Respondent No.1 to extend the time by 180 days for achieving the 'Conditions Precedent' and 'Commercial Operation' of the Project. The Supplemental Agreement dated 20.10.2015 which provides such extension, therefore, cannot be approved. Therefore, we answer Issue No. (3) in the negative.

12) **ISSUE No.(4):** *What Order?*

For the foregoing reasons, we pass the following Order:

ORDER

- (i) The Petitioner's Project is entitled to the tariff of Rs.7.47 (Rupees Seven and Paise Forty Seven) only per Kwh; and,

- (ii) The Petitioner is not entitled to any extension of time for achieving the Conditions Precedent and commissioning of the Project. Accordingly, necessary consequences as per the terms of the PPA shall follow.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER